

**People v Hill**

2013 NY Slip Op 32386(U)

October 7, 2013

Sup Ct, Kings County

Docket Number: 14111-1995

Judge: Michael A. Gary

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This opinion is uncorrected and not selected for official publication.



On September 12, 1997, the court conducted a *Wade* hearing , and the court denied the motion to suppress the lineup identifications. On November 3, 1997 the defendant's jury trial began. After the presentation of the evidence in the case, the People and the defense attorney delivered their summations to the jury in the morning of November 12, 1997. The jury was charged on the law that afternoon, and it reached a verdict at 4:50 PM the same day. The defendant was convicted by the jury of Murder in the second degree, Assault in the first degree, and Criminal possession of a weapon in the second degree. He was acquitted of the count of Attempted murder in the second degree.

Defendant filed a motion pursuant to CPL § 330.30 to set aside the verdict, alleging that the jury could not have found the defendant guilty based on the evidence presented, and complaining of prosecutorial misconduct in the summation. The People opposed the motion and this court denied it in a written decision dated January 6, 1998.

On January 9, 1998, Mr. Hill was sentenced to a term of imprisonment of a minimum of 25 years and a maximum of Life on the murder count, and a sentence of a minimum of 5 and a maximum of 15 years on the other two counts, all to be served concurrently with each other.

Defendant filed an appeal with the Second Department and argued on appeal, among other things, that the People had failed to prove that the defendant fired the gunshot that killed Mr. Sumpter, that the prosecution made improper comments on summation, that the court's instruction on flight was improper, and the element of Mr. Cassamajor's injury was not sufficiently proven to sustain the assault count. In upholding the conviction, the Appellate Division found that the defendant had failed to preserve these claims for appellate

review, and in any event they were without merit. (*People v. Hill*, 286 AD2d 777 [2d Dept, 2001]) . On December 27, 2001 defendant's application for leave to appeal to the Court of Appeals was denied at 97 NY2d 682.

In the instant motion the defendant argues for vacatur of the conviction stating that he received ineffective assistance of counsel, the prosecution committed error at summation, and the People withheld *Brady* material, entitling him to a new trial.

Defendant argues that counsel was ineffective in that he failed to impeach the police witness, who testified that he began his involvement in the case in June 1995, about a discrepancy in the dates on the paperwork relating to a lineup identification. The paperwork is dated January 1995, not 1996, though the narrative portion reflects the lineup occurring in January 1996. As the People point out, this was clearly a typographic error and irrelevant as impeachment material. A similar error by the detective in transcribing the time of the defendant's arrest as AM rather than PM, is *de minimus*; defense counsel exercised proper professional judgment in determining that this was an insignificant detail and chose not to belabor cross examination about this very minor error.

Defendant next complains that his attorney never explored with him the possibility of interposing a defense of justification. The People point out, however, that the court record shows that after the People rested, the court specifically inquired of Mr. Hill whether he intended to testify, and whether he had consulted with his attorney about his decision not to do so. This is relevant because the evidence presented up till that point supports the People's theory that the defendant began the altercation, that the murder victim ( Sumpter) was shot in the back as he was walking away from the defendant, and Cassamajor did not by all accounts

have a gun. Notably, Mr. Hill still has not explained how he was defending himself in shooting these two people. Defense counsel could not, without more, pursue a defense of justification and instead strategically pursued an alternative defense. He argued that since there were several gunshots, others- not the defendant - could have been responsible for the shootings. Though not successful, this was a reasonable strategy to pursue.

Defendant's allegation that defense counsel should have used both defenses is illogical. Simultaneously arguing that others were responsible for the shooting and that defendant did use his gun but was justified in doing so are contradictory. Defense counsel chose a reasonable defense under the circumstances. Defendant's complaint that counsel was ineffective for "conceding" defendant's guilt relating to possessing a gun that evening. This argument is a legitimate tactic, and thus counsel would not be ineffective for pursuing this strategy. *See People v. Washington*, 19 AD3d 1180 (4<sup>th</sup> Dept., 2005)

Defendant points next to counsel's ineffectiveness in that he failed to object to the proper notice regarding the location of the crime. (One witness testified that the shooting took place on Liberty Avenue, but more than a block away from where the deceased was found on the ground.) This is particularly so, defendant argues, since this discrepancy would have afforded him the opportunity to put forth an alibi defense. An examination of the record shows the People proved that the shooting took place on or about December 18, 1993 in the vicinity of 481 Lincoln Avenue, and more importantly, the defendant makes no supportable claim of being elsewhere!

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v Washington*, 466 U.S. 668; *People v Linares*, 2 NY3d 507, 510

[2004]; *see* U.S. Const., 6<sup>th</sup> Amend.; N.Y. Const., art. 1, §6). An attorney is “strongly presumed” to have rendered effective assistance to his client (*Strickland* at 690). To rebut this presumption, the defendant must be able to show that counsel’s conduct was outside the “wide range of professionally competent assistance” (*Id.*). Defendant also must be able to show that, but for counsel’s errors, the outcome of the trial would have been different (*Id.* at 694).

In New York, “[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation the constitutional requirement will have been met” (*People v Baldi*, 54 NY2d 137, 147 [1981]). “This protection does not guarantee a perfect trial, but assures the defendant a fair trial” (*People v Flores*, 84 NY2d 184, 187 [1994]). Accordingly, the reviewing court must separate ineffectiveness from “mere losing tactics” and the defendant must “demonstrate the absence of strategic or other legitimate explanation” for counsel’s conduct (*People v Baldi* at 146; *People v Rivera*, 71 NY2d 705, 709 [1988]). Defense counsel’s choice of strategy, even if unsuccessful, does not rise to the level of ineffective assistance as long as it is reasonable under the circumstances (*People v Benevento*, 91 NY2d 708, 713 [1998]). Defendant must also show that his right to a fair trial was prejudiced by the unfairness of the proceedings as a whole (*People v Stulz*, 2 NY3d 277, 284 [2004]).

In this instance, defendant’s claims fall far short of the high threshold required to substantiate an allegation of ineffective assistance of counsel. Defense counsel made motions, extensively cross-examined witnesses, and chose a reasonable defense. Because he



has failed to establish that counsel lacked a legitimate strategy or that he was prejudiced by the execution of his defense it remains “clear that the attorney provided meaningful representation” (*see People v Maldonado*, 278 AD2d 513 [2d Dept., 2000])

Defendant’s summation claims have either been raised or should have been raised in his previous appeal, as they are matters that appear on the record. CPL § 440.10 (2) (a) , (c). The Appellate Division rejected that part of the claim that was already raised.

Last, defendant argues that this conviction must be vacated because newly discovered evidence establishes that he was actually innocent. The evidence he points to is the original arrest paperwork showing that at some point he was arrested ONLY for the murder of Sharod Sumpter and not the shooting of Joel Cassamajor. Thus, the defendant argues that the People’s failure to turn over material relating to Cassamajor’s testimony at trial which he designates as a *Brady* violation, entitles him to a new trial.

The court strongly rejects the defendant’s position. The attorney at trial were provided with all of the *Rosario* material for the testifying witnesses. More so, as the charges all related to the same time and place of occurrence they were properly joined in one indictment. None of this material was newly discovered since the trial, and thus there is no basis to grant Mr. Hill a new trial. Furthermore, this court cannot fathom how this claim establishes the defendant’s innocence of the crimes charged.

Accordingly, finding no basis to grant the defendant’s motion to vacate the judgment of conviction, this court hereby denies it in its entirety.

This decision constitutes the order of the court.

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 of his right to apply

to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certification granting leave to appeal is granted.

Dated: Brooklyn, New York  
October 7, 2013

  
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MICHAEL A. GARY, J.S.C.

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